In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-1108
SECRETARY OF COMMERCE, *et al.*, *Appellants*,
vs.
ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, *et al.*, *Appellees*.

No. 78-1114
SECRETARY OF COMMERCE, *et al.*, *Appellants*,
vs.
ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, *et al.*, *Appellees*.

No. 78-1382
JUANITA KREPS, SECRETARY OF COMMERCE, *Appellant*,
vs.
ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, *et al.*, *Appellees*.

No. 78-1107
CHARLES ARMISTEAD; MARION HILL; LEO WEBB, *et al.*, *Appellants*,
vs.
ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, *et al.*, *Appellees*.

No. 78-1442
NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *Appellant*,
vs.
ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, *et al.*, *Appellees*.

Appeal from the United States District Court
Central District of California

MOTION TO AFFIRM

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Pursuant to Paragraph 1(c) of Revised Rule 16 of this Court, Associated General Contractors of California; Engineering Contractors Association; American Subcontractors Association; Los Angeles County Chapter, National Electrical Contractors Association, Inc.; Steve P. Rados, Inc.; Griffith Company; Gordon H. Ball, Inc.; Stoddard Enterprises; and Granite Construction Company, appel-

lees (hereinafter Contractors), move that the judgment of the District Court be affirmed. The judgment is now reported at 441 F. Supp. 955 (C.D. Cal. 1977). The opinion of the District Court addressing the issue of mootness on remand is reported at 459 F. Supp. 766 (C.D. Cal. 1978).

QUESTIONS PRESENTED

1. All appellants have presented the question whether the District Court erred when it determined that this case was not moot.

2. All appellants, except Charles Armistead, *et al.*, have presented the question whether the District Court erred when it determined that Section 103(f)(2) of the Public Works Employment Act of 1977 violated the equal protection guarantees of the Fifth Amendment to the United States Constitution and was inconsistent with Title VI of the Civil Rights Act of 1964.

3. City of Los Angeles and its various political entities have also questioned whether the District Court erred in holding that Contractors had standing to sue and need not exhaust their administrative remedies.

STATUTE INVOLVED

The provision of the statute involved in this appeal is Section 103(f)(2) of the Public Works Employment Act of 1977 (Pub. L. No. 95-28). Section 103(f)(2) amends Section 106 of the Local Public Works Capital Development and Investment Act of 1976 (42 U.S.C. § 6705) and provides:

"(2) Except to the extent that the Secretary determines otherwise, no grant shall be made under this Chapter for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises. For purposes of this paragraph, the term 'minority business enterprise' means a business at least 50 per centum of which is owned by minority group members or, in case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members. For the purposes of the preceding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts."

STATEMENT OF THE CASE

The Statutory Scheme

On July 22, 1976, the United States Congress enacted the Local Public Works Capital Development and Investment Act of 1976 (42 U.S.C. §§ 6701, *et seq.*) (hereinafter the Public Works Employment Act of 1976). This Act appropriated $2 billion of federal monies for which state and local entities could make application in order to alleviate unemployment and improve public works facilities. This Act specifically forbade discrimination:

> "[O]n the grounds of race, religion, color, national origin, or sex . . . under any program or activity funded in whole or in part with funds made available under this subchapter." 42 U.S.C. § 6727(a).

On May 13, 1977, Congress enacted the Public Works Employment Act of 1977 (Pub. L. No. 95-28), amending the 1976 Act. The amendments, among other things, in-

cluded the provision quoted in full above, which required that at least 10 percent of the dollar value of each project grant be expended with certain minority business enterprises. On May 27, 1977, the Secretary of Commerce (hereinafter Secretary) issued regulations implementing Public Law No. 95-28. These regulations restated the statutory requirement that no grant would be made under the Act unless at least 10 percent of the grant amount is expended with minority business enterprises. 42 Fed. Reg. 27,434-35 (May 27, 1977).

The Secretary had until September 30, 1977, to obligate the funds appropriated by Congress under the 1977 Act. In September, 1977, Los Angeles City and County and their entities (hereinafter local appellants) began announcing bid requests for projects already approved for federal funding, with bid opening to begin in October, 1977.

The Proceedings to Date

On October 5, 1977, Contractors filed their Complaint for Declaratory and Injunctive Relief in the United States District Court for the Central District of California. In their complaint, Contractors sought a declaration that the minority business enterprise (hereinafter MBE) requirement of the Public Works Employment Act of 1977 and the actions of the Secretary and local appellants pursuant to this requirement were unconstitutional. They further sought an injunction preventing the Secretary from mandating that local appellants require bidders to comply with the 10 percent minority business enterprise quota, preventing the Secretary from taking actions penalizing noncompliance with the minority quota and from taking any

other action in regard to the requirement. An injunction was also sought preventing local appellants from utilizing the minority requirement in their bid specifications for and awards of contracts for projects funded by the Public Works Employment Act of 1977.

On October 6, 1977, Contractors moved for and were granted a temporary restraining order restraining the Secretary from granting any further funds to Los Angeles City and County under the Public Works Employment Act of 1977 for projects which required the 10 percent minority business enterprise allocation and restraining the local defendants from awarding bids for projects funded by the Act which required the minority allocation.

A hearing on Contractors' motion for preliminary injunction was set for October 31, 1977. On October 21, 1977, the Secretary filed a motion for summary judgment. Both motions were heard on October 31, 1977, at which time local appellants and Contractors also moved for summary judgment. The District Court then proceeded to hear the case and rule on the merits by consolidating the hearing on preliminary injunction with the hearing on the permanent injunction under Federal Rule of Civil Procedure 65(a)(2).

The District Court determined first that Contractors had standing to seek relief and need not exhaust administrative remedies. Second, it ruled on the merits that the statute, regulations, and procedures of all defendant-appellants were unequivocally unconstitutional under the Fifth Amendment to the United States Constitution and were inconsistent with Title VI of the Civil Rights Act of

1964. Third, the court issued an injunction which prevented enforcement of the minority business enterprise requirement for projects funded under the Public Works Employment Act of 1977 only after October 31, 1977, in the case of the Secretary of Commerce and January 1, 1978, in the case of Los Angeles City and County.

All parties appealed to this Court. Contractors sought to have the District Court's injunctive order broadened, while the Secretary and local appellants sought to have the judgment overturned. On July 3, 1978, this Court vacated the District Court's judgment and remanded the case to the District Court to consider the question of mootness.

On October 16, 1978, the District Court held its hearing regarding the question of mootness. Following this hearing, the court, on October 20, 1978, issued its determination that the case was not moot, reinstated in full its prior opinion, and allowed the intervention of Charles Armistead, *et al.*, and the National Association for the Advancement of Colored People.

On November 16 and 17, 1978, the present appellants appealed to this Court.

ARGUMENT

I

THE CASE IS NOT MOOT

All the appellants have argued that the present case appears to be moot and that the District Court committed error in failing to make a determination of mootness. However, a finding of mootness can be made only after a court has examined all the circumstances to determine whether a substantial controversy exists between the litigants. *Super Tire Engineering Co. v. McCorkle,* 416 U.S. 115, 122 (1974). In making this determination in numerous cases which have come before it, this Court has set forth a series of so-called exceptions to the mootness doctrine. These exceptions establish that if certain factors exist, a case, which at first blush might appear to be moot, will not be so found. In the present case, certain of these exceptions operate to indicate that, as determined by the District Court, the case is not moot.

A. The Circumstances Involved Are Capable of Repetition Yet Would Evade Review

In *Southern Pacific Terminal Co. v. Interstate Commerce Commission,* 219 U.S. 498 (1911), this Court reached the merits of a case based on an order of the Interstate Commerce Commission even though the order had expired. In addressing the issue of mootness, the Court held:

> "The question involved in the orders of the Interstate Commerce Commission are usually continuing . . . and these considerations ought not to be, as they might be, defeated, by short-terms orders, capable of repetition, yet evading review, and at one time the government,

and at another time the carriers, have their rights determined by the Commission without a chance of redress." *Southern Pacific Terminal,* 219 U.S. at 515.

The *Southern Pacific Terminal* ruling has led to a series of cases which indicate that appellate review of a case will not be foreclosed simply because certain of the circumstances involved with the situation attacked have ceased to exist, if the underlying dispute between the parties is capable of recurring, but, because of time constraints, is unlikely to reach appeal before the situation has again ceased to exist. *See Nebraska Press Association v. Stuart,* 427 U.S. 539 (1976). Following this reasoning, the District Court ruled that the present case could not be considered moot inasmuch as it was capable of repetition, yet would evade review.

The Secretary has argued that the standard of "capable of repetition" cannot be applied here on the grounds that the governmental activity under the challenged statute has ceased, in that all but one of the contracts funded under the Public Works Employment Act of 1977 have been let, and that Congress has not acted to extend the program. As will be discussed below, governmental activity, taken pursuant to the challenged legislation, which affects Contractors, has *not* ceased. However, even were this not the case, the fact that Congress, while still considering an extension of the challenged provisions, has not yet acted to extend the program, does not require a finding that such program is not "capable of repetition."

First, the requirement is that the circumstances be "capable of repetition," not certain of repetition. In cases which have applied the requirement to defeat mootness,

this Court has used lenient standards regarding the speculative nature of the likelihood of recurrence. *Nebraska Press Association v. Stuart,* 427 U.S. at 546-47; *Moore v. Ogilvie,* 394 U.S. 814 (1969). The facts of the present case clearly indicate that these standards have been met.

Since the spring of 1978, there have been numerous attempts to extend the federal assistance rendered by the Public Works Employment Acts of 1976 and 1977 and to extend the MBE program outlined in Section 103(f)(2) of the 1977 Act. *Associated General Contractors v. Secretary of Commerce,* 459 F. Supp. 766, 774-75 (C.D. Cal. 1978) (hereinafter *Associated General Contractors II*). Although Congress adjourned in 1978 without acting upon any extending legislation, renewed attempts at extension are presently being made.

Hearings before the House Subcommittee on Economic Development are currently being held on H.R. 2063, a bill to amend the Public Works and Economic Development Act of 1965 (42 U.S.C. §§ 3121, *et seq.*), to extend the authorizations for three years. The staff of the Subcommittee on Economic Development of the Committee on Public Works and Transportation has informed counsel for Contractors that efforts will be made to incorporate into the bill the features of and assistance rendered by the Public Works Employment Acts of 1976 and 1977. Thus, it appears that the federal government is firmly committed to an extension of the challenged program. Indeed, certain appellants concede the fact that "Congress will most certainly renew the Public Works Employment Act despite the controversy over the 10% minority preference." Jurisdictional Statement of Charles Armistead, *et al.,* at 8.

Second, the fact that Congress may enact an MBE provision that differs somewhat from the one challenged is not, as argued by the Secretary, dispositive of a mootness determination. As was noted by the Ninth Circuit Court of Appeals in *Williams v. Alioto,* 549 F.2d 136, 143 n.8 (9th Cir. 1977):

> "The repetition/evasion exception [to the mootness doctrine] does not require a repetition of the exact law or behavior. The focus is on whether the same issues, arising from a repetition of a similar law or action, are likely to recur. *See Southern Pacific Terminal Co. v. ICC, supra,* 219 U.S. at 515, 31 S.Ct. 498."

Finally, in arguing that the possibility of future congressional action will not avoid mootness of this case, the Secretary cites a number of cases. Federal Jurisdictional Statement at 11-12. Neither the fact situations nor the reasoning of this Court in any of these cases can be applied to the present case. In *Preiser v. Newkirk,* 422 U.S. 395 (1975), the facts revealed that it would be virtually impossible for defendants to act again toward plaintiff as they had previously. This situation is contrary to that presented herein where the facts indicate that action to carry out activity similar to that challenged has and is being considered. The citations to *Allee v. Medrano,* 416 U.S. 802 (1974), and *Hall v. Beals,* 396 U.S. 45 (1969), are equally inappropriate. In both these cases the statute involved in the challenge had been repealed and replaced with new legislation. In the present case, as noted by the District Court, Congress has neither amended nor repealed the MBE provision of the Public Works Employment Act of 1977 and there are definite indications that the program will be continued. *Associated General Contractors II,* 459

F. Supp. at 775. Further, as will be discussed, significant governmental activity is presently continuing under the challenged statute.

Similarly, the mootness determination in *Golden v. Zwickler,* 394 U.S. 103 (1969), cannot legitimately be applied to the facts of the present case. In *Zwickler,* mootness was determined based upon a change in plaintiff's position which had removed the effect of the challenged practices upon him. This is obviously not the situation in the present case wherein it is defendants' rather than plaintiffs' conduct which has altered. Unlike the plaintiff in *Zwickler,* Contractors, being nonminority general contractors and subcontractors who have the desire and capability to bid on local public works projects, are certain to be affected no matter what the future action of Congress or defendants in regard to MBE participation in these projects. Finally, the Secretary's citation of *O'Shea v. Littleton,* 414 U.S. 488 (1974), is puzzling as well as inappropriate. Not only does the issue in *Littleton* involve an assessment of the plaintiffs' rather than defendants' activities, as in *Zwickler,* but also the ruling of the Court simply does not address the mootness issue.

The Secretary has also argued that the "yet evading review" portion of the "capable of repetition, yet evading review" mootness exception cannot be applied to the present case. This argument, however, is also without foundation. The Public Works Employment Act of 1977, the congressional proposals to extend it in 1978, and most likely future proposals, have been designed for the purpose of getting money into local projects as quickly as possible. Because of this, Section 6705(d) of Title 42,

United States Code, requires that work on construction of federally funded projects must, under ordinary circumstances, begin within 90 days of project approval. In the present case, the original complaint was filed on October 5, 1977, five days after the deadline for allocation of federal funds for projects. The District Court found that:

> "Any earlier action by plaintiffs would not have defined a concrete controversy, since additional projects might have been approved by the Secretary until September 30." *Associated General Contractors v. Kreps,* 441 F. Supp. 955, 963 (C.D. Cal. 1977) (hereinafter *Associated General Contractors I*).

Thus, the time between filing a viable suit, as defined by the District Court, and contract letting, which the Secretary indicates signals the end of an active controversy for purposes of review, is extremely short—*90 days at the most.* It goes without saying that if this period were used to confine appellate review, such review would be impossible.

In arguing that this case should not be considered one which evades review, the Secretary has indicated that the case has become moot, not because of the time constraints involved in the situation, but because of the District Court's order which did not enjoin defendants' contracting procedures. Federal Jurisdictional Statement at 13. Apparently, the Secretary is arguing that because the District Court could have enjoined these procedures, but did not, the situation is not one which would ordinarily evade review before the end of contracting.

Leaving aside for the moment a recitation of the ambiguous activity of the Secretary which perhaps induced the District Court to issue its order in the terms which it

did (*Associated General Contractors II,* 459 F. Supp. at 778-79), Secretary's argument cannot withstand close scrutiny. Obviously, if carried to its logical conclusion, it would work to deny review to plaintiffs who were appealing from losing judgments in these types of cases.[1]

Further, in *Dunn v. Blumstein,* 405 U.S. 330, 333 n.2 (1972), this Court discussed the "capable of repetition, yet evading review" standard in the context of a challenge to an election law which had initially prevented the plaintiffs from voting, but which because of the passage of time did not, at the time of review, prevent voting. From this discussion, it is apparent that it is the situation created by the operation of time and the statutory scheme challenged, not by the court's order, which is important in determining whether the case is one which would evade review.[2]

Thus, it is clear that the situation which led to the present lawsuit, statutory imposition of a minority business enterprise quota for federal public works projects, is capable of repetition. Indeed the facts make it clear that such repetition is likely. It is also obvious that because of the time constraints involved in emergency federal relief

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[1]It should be noted that the Secretary did not even raise the mootness issue before the Second Circuit Court of Appeals to which plaintiffs therein appealed a losing judgment. *Fullilove v. Kreps,* 584 F.2d 600 (2d Cir. 1978), *petition for cert. pending,* No. 78-1007. *See Associated General Contractors v. Secretary of Commerce,* 459 F. Supp. 766, 779-80 (C.D. Cal. 1978).

[2]In *Dunn v. Blumstein,* 405 U.S. 330 (1972), the District Court could have preserved the status quo with respect to the election in which Blumstein was prevented from voting by allowing him to cast a sealed provisional ballot. *Id.* at 332, n.2. However, the District Court refused this option and this Court did not consider this significant in its discussion of the "capable of repetition, yet evading review" standard.

programs such as the one challenged, appellate review could not be completed before the circumstances inherent in the situation challenged again ceased to exist. Therefore, as determined by the District Court, the facts of this case fit squarely within the "capable of repetition, yet evading review" exception to the mootness doctrine and it is submitted this ruling should be upheld.[3]

B. The W. T. Grant—Concentrated Phosphate Exception to Mootness Applies to this Case

The Secretary has alleged that the conduct of which Contractors complain has ceased in that all contracts but one funded by the challenged legislation have been let. However, cessation of allegedly illegal conduct will not, in itself, render a case moot. When the legality of the defendants' actions has been questioned in a declaratory relief action, the cessation of defendants' conduct involved in the initial action will not necessarily deprive this Court of jurisdiction if something still remains to be determined. *Super Tire,* 416 U.S. at 121-22; *United States v. W. T. Grant Co.,* 345 U.S. 629, 632 (1953). If the defendant is free to return to his old ways, "[t]his, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion." *Id.*

The burden of showing mootness in this situation is upon the defendant. In *W. T. Grant Co.,* 345 U.S. at 633, the Supreme Court indicated:

[3]It is interesting to note that Justice Harold Leventhal of the United States Court of Appeals for the District of Columbia Circuit has indicated his belief that a "case" involving the fact situation presented herein would not be moot "[i]n view of the doctrine that carves out an exception to mootness for probably recurring controversies." *American Bar Association Journal* 65:214 (1979).

> "The case may nevertheless be moot if the defendant can demonstrate that 'there is no reasonable expectation that the wrong will be repeated.' [Footnote omitted.] The burden is a heavy one."

After completing an analysis of *W. T. Grant Co.* and *United States v. Concentrated Phosphate Export Association,* 393 U.S. 199 (1968), which expanded *W. T. Grant Co.,* the District Court concluded that the Secretary had not met her burden of demonstrating nonrecurrence. The court, therefore, held that the *W. T. Grant—Concentrated Phosphate* doctrine must be applied to defeat mootness in the current case.

The Secretary has challenged this holding apparently on the theory that it cannot be applied unless the court has determined that the defendant "is simply waiting for the dismissal of the action to resume the challenged conduct." Federal Jurisdictional Statement at 14. This theory is without merit. What *W. T. Grant Co.* and *Concentrated Phosphate Export Association* require is a determination by the court, based on a showing made by defendant, "that 'there is no reasonable expectation that the wrong will be repeated.'" *W. T. Grant Co.,* 345 U.S. at 633. Thus, there does not have to be any determination that the wrong *will be* repeated upon a dismissal, merely a finding, as made by the District Court herein, that defendant has not convinced the court that the wrong *will not be* repeated. *St. Paul Fire & Marine Insurance Co. v. Barry,* 46 U.S.L.W. 4971, 4973 (1978).

The propriety of the District Court's ruling in this regard is confirmed by this Court's discussion in *Concentrated Phosphate Export Association,* 393 U.S. at 203:

> "The test for mootness in cases such as this is a stringent one. Mere voluntary cessation of allegedly illegal conduct does not moot a case; if it did, the courts would be compelled to leave '[t]he defendant . . . free to return to his old ways.' [Citations omitted.] A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur. But here we have only appellees' own statement that it would be uneconomical for them to engage in any further joint operations. Such a statement, standing alone, cannot suffice to satisfy the heavy burden of persuasion which we have held rests upon those in appellees' shoes."

In the present case, unlike that in *Concentrated Phosphate Export Association,* we are without even a statement by the Secretary that she does not intend to continue the practice of allotting federal funds on the basis of race or national origin. Indeed, it is unlikely that she could make this assertion since continued efforts have been made to extend the challenged program.

Further, as related by the trial court, the course of conduct pursued by the Secretary during this litigation is replete with the making of erroneous factual assertions regarding both the merits and possible mootness of this case. *Associated General Contractors II,* 459 F. Supp. at 778-79. Since the Secretary's assertion in March, 1978, that there were no contracts containing the MBE provision remained to be let in Los Angeles (Federal Jurisdictional Statement filed in *Kreps v. Associated General Contractors of California,* No. 77-1271, at 6-7), the facts as described below reveal that such contracts have been and still are

being let. This conduct alone precludes the Secretary from carrying her heavy burden of persuasion.

Indeed, in *Mills v. Green,* 159 U.S. 651, 654 (1895), this Court established the rule that the events which raise the issue of mootness must take place free from any fault on the part of defendant. The Secretary's activity before the District Court which clouded the issues in respect to the status of funds remaining to be disbursed in October, 1977 (*Associated General Contractors II,* 459 F. Supp. at 778-79), and the misstatements made in her initial Jurisdictional Statement in this case (*Kreps v. Associated General Contractors of California,* No. 77-1271, at 6-7), appear themselves to constitute that degree of fault which would prevent a court from making a determination of mootness contrary to the interest of Contractors in this case. In fact, as was noted by the District Court, it appears that part of the official strategy of the federal government in this case was to stall the litigation for as long as possible in order to keep the funds flowing. *Associated General Contractors II,* 459 F. Supp. at 776 n.19.

C. The Challenged Program Has Continuing Effect Upon Contractors

While the District Court's decision regarding the mootness issue in this case was based upon its analysis of the "capable of repetition, yet evading review" and *W. T. Grant—Concentrated Phosphate* exceptions to the mootness doctrine, there is yet another reason which mitigates against a finding of mootness in the present case. In *Carroll v. President and Commissioners of Princess Anne,* 393 U.S. 175 (1968), this Court held that a challenge to a

ten-day restraining order was not moot in spite of the fact that the order had long since expired. This reasoning was based not only upon the finding that the challenged order was "capable of repetition, yet evading review" but also upon a finding that the order had continuing effect on the petitioner's activities. *Id.* at 178-80.

In the present case, this continuing effect may similarly be felt. The injunctive relief ordered by the District Court did "not govern or apply to Federal funds heretofore granted [before October 31, 1977] or to any actions by Federal Defendants with respect to such funds heretofore granted." 441 F. Supp. at 1044. Therefore, since the federal funds allocated under the challenged program had been allotted by October 31, 1977, Contractors are forever prevented from challenging allocations or contracts even if contracts must be rebid due to lack of initial response or unsatisfactory performance or if the award of any contracts has been delayed.

As conceded by the Secretary, both in her initial Jurisdictional Statement in this case and in her present statement, if any such contracts are still outstanding, a live controversy may remain. Federal Jurisdictional Statement at 15. Contrary to her initial statements that all contracts had been let, the Secretary now admits that one contract remains outstanding. Federal Jurisdictional Statement at 7. This in itself would seem to be enough to preserve the issues of the present case on appeal. However, Contractors have learned that, in addition to the Charmlee Park project referred to by Secretary, as of the date of her Jurisdictional Statement, contracts for four other projects funded

by the Public Works Employment Act of 1977 had not yet been let! Indeed, for one of these projects, bids had not even been advertisd.[4] This continuation of activity regarding contracts funded under the Act clearly negates the mootness issue in this case, inasmuch as it makes clear the continuing effect of the challenged activity and the court's order upon Contractors.

In reference to this approach, Secretary has argued that since the District Court did not make its determination in regard to mootness based on the continuing effect on Contractors, that court's judgment should be vacated as moot, "without prejudice to the plaintiffs' right to refile the action if they can show some ground on which the case may continue to present a live controversy." Federal Jurisdictional Statement at 16. Not only does this suggestion indicate a lack of appreciation for the concept of judicial economy, it also fails to consider the fact that this Court must affirm the lower court's determination regarding mootness if it is correct on *any* grounds. As was noted by this Court in *Helvering v. Gowran,* 302 U.S. 238, 245 (1937):

> "In the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason."

In summary, it is submitted that the District Court correctly determined that the present case cannot be found moot. The defendant-appellants have not shown that the

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[4]Contracts were not let for Rancho Los Amigos Power Station, Phase III; the Music Center Mall Garage Ventilating System; and the Sun Village Water Main Avenue Q until the end of March, 1979. Bids have not yet been advertised for the demolition of the old John Wesley Hospital.

controversy is unlikely to occur again and if this recurrence takes place, review may well be impossible before all contracts have been let. Finally, the activities of defendant-appellants and the order of the District Court will have continued effect on Contractors. Therefore, it is submitted that this Court should affirm the decision of the District Court in regard to mootness.

II

THE JUDGMENT OF THE DISTRICT COURT IN REGARD TO STANDING, EXHAUSTION, AND THE MERITS SHOULD BE AFFIRMED

A. Standing and Exhaustion

Local appellants' questions regarding exhaustion of administrative remedies and standing present clearly insubstantial issues. The holding of the trial court which did not require exhaustion is undeniably correct. In fact, it is questionable whether Contractors had any remedies to exhaust. While waiver of the MBE requirement was a theoretical possibility under the 1977 Act, it was available not to Contractors, but only to Los Angeles City and County as grantees. Even if Contractors had access to the waiver procedures, however, exhaustion would not be required under this Court's holding in *Public Utilities Comm'n v. United States,* 355 U.S. 534 (1958), since the administrative proceedings could not dispose of the underlying constitutional challenge posed by Contractors.

In a similar manner, the ruling of the trial court in regard to Contractors' standing is without error. The federal law of standing requires a showing of immediate or

threatened injury to individual plaintiffs or members of plaintiff associations from the challenged action. *Warth v. Seldin,* 422 U.S. 490, 511 (1975). The facts presented to the District Court amply demonstrated this injury to Contractors in that, among other things, the minority business enterprise requirement excluded certain nonminority plaintiffs from consideration for jobs and required others to bid on jobs on unfamiliar or perceivedly illegal terms or to forego bidding entirely. Inasmuch as the case law, including prior rulings by this Court, conclusively indicates that Contractors herein have both standing and no obligation to exhaust administrative remedies, these issues present insubstantial questions for this Court.

B. The Merits

The decision of this Court in *Regents of the University of California v. Bakke,* ..... U.S. ....., 46 U.S.L.W. 4896 (1978), reemphasizes the holding of the District Court that the MBE provision of the Public Works Employment Act of 1977 is unconstitutional and illegal.

In *Bakke,* the Court addressed the issue of whether the Fourteenth Amendment to the United States Constitution and/or Title VI prevented the utilization of a medical school admissions program which reserved at least 16% of its available places for minority group members and, in effect, established two separate admissions programs, one for designated minorities and one for whites.

Justices Stevens, Stewart, Rehnquist, and the Chief Justice would have decided the case on the basis of Title VI alone, stating that the statute must have a "colorblind" application which prevents the exclusion of *any* person

from a federally funded program on the ground of race. Specifically, these four justices stated:

> "[T]he meaning of the Title VI ban on exclusion is crystal clear: Race cannot be the basis of excluding anyone from participation in a federally funded program." *Id.* at 4935.

The Title VI opinion of these four justices did not constitute a majority in *Bakke*. However, when the opinion of Justice Powell in regard to Title VI is considered, it is apparent that the decision of a majority of the Court's members supports the trial court's ruling finding that the MBE program here at issue is invalid and illegal under Title VI.

Justice Powell, in *Bakke,* went beyond the Title VI issue and held that the manner in which the university utilized race to exclude individuals violated Bakke's equal protection rights guaranteed by the Fourteenth Amendment. In dealing with Title VI, Justice Powell indicated that:

> "[e]xamination of the voluminous legislative history of Title VI reveals a congressional intent to halt federal funding of entities that violate a prohibition of racial discrimination similar to that of the Constitution." *Id.* at 4900.

Therefore, in Justice Powell's opinion, if a federally funded activity violates the Constitution's guarantees in regard to racial treatment, it also violates Title VI. As will be discussed, the MBE program clearly violates equal protection as construed by Justice Powell.

At the onset, in dealing with the constitutional question the District Court correctly noted that in utilizing the minority business enterprise requirement, the Public Works

Employment Act of 1977 set forth a classification based solely upon race. This Court has held that when faced with a constitutional equal protection challenge, such a classification must be subjected to strict scrutiny. *Loving v. Virginia,* 388 U.S. 1, 11 (1967). In order to pass this scrutiny, it has been further determined by this Court in the past, and confirmed by Justice Powell in *Bakke,* that a statute incorporating the classification must meet a compelling state interest and be drawn with precision and tailored to serve its legitimate objectives. If there are other reasonable ways to achieve its goals with a lesser burden on constitutionally protected activity, the government may not choose the way of greater interference. *Dunn v. Blumstein,* 405 U.S. at 343.

The District Court correctly determined that a minority preference, such as the one included in the Public Works Employment Act of 1977, cannot meet the compelling state interest standard. No holding by this Court contradicts this reasoning. As recognized by the District Court (*Associated General Contractors I,* 441 F. Supp. at 963), such a standard might be met if the preference were designed as a remedy for specific past discrimination. *Bakke,* 46 U.S.L.W. at 4906-07 (opinion of Justice Powell). However, it is clear from the limited legislative history available dealing with the challenged MBE provision that the quota was imposed without any findings of discrimination against minority businesses. It was designed primarily to give minority businesses a preference in order to grant them an arbitrary "fair share" of a federal program. 123 Cong. Rec. H1436-41; S3910. Under these circumstances, Justice

Powell, writing in *Bakke,* 46 U.S.L.W. at 4906-07, makes it clear that the program cannot pass constitutional muster:

> "We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations. . . . Without such findings of constitutional or statutory violations, it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another. Thus the government has no compelling justification for inflicting such harm." (Footnote omitted.)

Nor, as found by the District Court, can the minority requirement meet the other criteria of the strict scrutiny test. Under these criteria, the government must show that no other means exists to achieve its objective, assuming this is to be considered legitimate, which would be less constitutionally burdensome on those affected. *Dunn v. Blumstein, supra.* Clearly an enactment which totally excludes nonminority businesses from competing for $400 million (10 percent of the $4 billion allotted by the Public Works Employment Act of 1977) of federal funds is extremely burdensome. However, again, the limited legislative history of Section 103(f) shows that no other means of aiding minority enterprises was even considered.

Finally, the imposition of an arbitrary 10 percent nationwide minority preference is hardly drawn with precision. Nor can it be said to be tailored to meet its objectives. While the quota might give some minority businesses a "fair share" of federal funds, there is no attempt to ensure that these funds would go to alleviating employment

distress in the minority community, or to building up fledging minority enterprises.

In criticizing the District Court's decision, the Secretary urges that the MBE program is appropriately tailored to aid members of minority groups suffering discrimination and is flexible enough to satisfy the needs of nonminority contractors. Federal Jurisdictional Statement at 22-23. These arguments fail to note several factors. First, as the opinion of Justice Powell in *Bakke,* 46 U.S.L.W. at 4904, makes clear, the guarantees of equal protection extend to individuals, not groups. If any remedies for discrimination are to be fashioned legally, they must be created with the injured individuals in mind. *See International Brotherhood of Teamsters v. United States,* 431 U.S. 324 (1977); *Franks v. Bowman Transportation Co.,* 424 U.S. 747 (1976). Neither the statutory language, the legislative history, nor the operation of the MBE program here at issue indicate any effort was made to aid any individuals suffering discrimination. As found by the District Court, the only criteria for preferential consideration here was racial and/or national affiliation. *Associated General Contractors I,* 441 F. Supp. at 965.

Furthermore, the purported flexibility of the challenged program, referred to by the Secretary, is little more than a sham. Upon examination of the Secretary's guidelines implementing the MBE program, the District Court in *Wright Farms Construction, Inc. v. Kreps,* 444 F. Supp. 1023, 1032 (D. Vt. 1977), found that the Secretary would not grant a waiver of the ten percent quota where there was even one MBE available in the area. Indeed, through-

out the course of this litigation, the Secretary has been unable to point to a single instance in which a waiver was granted. In *Bakke,* in at least one instance, the University did waive the quota to admit a nonminority. *Bakke,* 46 U.S.L.W. at 4898 n.6. Apparently, then, the MBE quota here is even more rigid than that invalidated in *Bakke.*

Therefore, it is apparent that the District Court correctly determined that the MBE requirement of the Public Works Employment Act of 1977 is both constitutionally and statutorily invalid. It is submitted that this determination should be summarily affirmed.

Contractors have asserted that the holding of the District Court on the issues of standing, exhaustion, and the invalidity of Section 103(f) of the Public Works Employment Act should be affirmed. However, Contractors are aware of the numerous cases dealing with the unconstitutionality of the minority preference in which varying determinations have been reached. Federal Jurisdictional Statement at 18 & n.7. Contractors are also aware that these varying determinations will engender confusion and controversy and be the subject of numerous further judicial proceedings. In view of these facts and the high likelihood that future preference programs similar to that in the Public Works Employment Act of 1977 will be enacted, this Court may wish to note probable jurisdiction and set this case for argument.

CONCLUSION

For the reasons stated above, the judgment of the District Court should be summarily affirmed. In the alternative, probable jurisdiction should be noted.

Respectfully submitted,

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